



No. 91-1393

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

A.L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION

PETITIONER

vs.

BOBBY RAY FRETWELL

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD R. MEDLOCK
1810 UNION NATIONAL PLAZA
124 WEST CAPITOL AVENUE
LITTLE ROCK, AR 72201
(501) 370-5024

COUNSEL FOR RESPONDENT

14 pp

QUESTION PRESENTED

WHETHER RESPONDENT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

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THIS COURT SHOULD DENY CERTIORARI HEREIN BECAUSE THE NARROW QUESTION PRESENTED IS NOT THE SUBJECT OF A CONFLICT OF PRIOR DECISIONS, PETITIONER HAS NOT SHOWN THAT PENDING LITIGATION EXISTS WHICH INVOLVES THE SAME OR A SIMILAR QUESTION, AND THE DECISION BELOW IS IN FULL ACCORD WITH PRINCIPLES EXPRESSED IN DECISIONS OF THIS COURT.

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Bobby Ray Fretwell, the respondent, opposes the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas is reported as Fretwell v. Lockhart, 739 F. Supp. 1334 (E.D. Ark. 1990) (Petitioner's Appendix A-21). The opinion of the United States Court of Appeals for the Eighth Circuit is reported as Fretwell v. Lockhart, 946 F.2d 571 (8th Cir. 1991) (Petitioner's Appendix A-1).

3.

JURISDICTION

The jurisdiction requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part:

"...[A]nd to have the assistance of counsel for his defense...."

The first section of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"...[N]or shall any state deprive any person of life, liberty, or property, without due process of law;...."

4.

STATEMENT

The facts of the case are stated fully in the decisions of the United States District Court (Petitioner's Appendix A-21), and the United States Court of Appeals for the Eighth Circuit (Petitioner's Appendix A-1).

5.

ARGUMENT

The issue presented in this case is unique and is limited to the unusual facts of the case. Despite petitioner's claim that the Court is afforded herein an opportunity to provide guidance to lower courts in this area, the value of the case as such is minimal at best. No conflict with prior decisions of this or other courts is presented, the petitioner has not shown that there is pending litigation involving the same or a similar issue, and the decision of the court below is in full accord with principles expressed in decisions of this Court. For these reasons, review on certiorari is unwarranted.

The respondent herein was denied his Sixth Amendment right to the effective assistance of counsel at his capital-felony murder trial. In recognition of this deprivation, the Eighth Circuit Court of Appeals correctly applied the clear principles of Strickland v. Washington, 466 U.S. 668 (1984). Strickland defines ineffective assistance as counsel's deficient performance which results in prejudice to the Defendant. This two-prong test was met where respondent's trial counsel failed to make a motion which, had it been made, would have in all probability, resulted in respondent receiving a sentence of life without parole rather than a sentence of death.

The motion in question would have been one to preclude submission to the jury, at the sentencing phase of the trial, of the aggravating circumstance that the murder was committed for

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pecuniary gain. As the petitioner correctly notes, under the rule of Collins v. Lockhart, 754 F.2d 258 (8th Cir.), cert. denied, 474 U.S. 1013 (1985), submission to the jury of pecuniary gain as an aggravating circumstance of a robbery/murder was, at the time of respondent's trial, an impermissible violation of the Eighth and Fourteenth Amendments. The violation occurred, Collins held, because using an aggravating circumstance to justify the imposition of death, which circumstance duplicated an element of the underlying offense, failed to narrow the class of death-eligible defendants to those who should get the death penalty. Collins was good law in the Eighth Circuit at the time of respondent's trial, and the fact that years later it was impliedly overruled does not, as the petitioner suggests, address itself to the analysis of respondent's ineffective assistance claim.

Strickland, supra, does address itself to this analysis, and provides all the guidance this Court or any other should need. The guidelines are clear:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id. at 689.

Thus, a court deciding an actual ineffective claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.

Id. at 690.

7.

In August of 1985, the time of respondent's trial, Collins was the only case directly construing Arkansas' capital punishment statute which addressed the issue of "double-counting" of aggravating circumstances and elements of the underlying felony. The rule was clear that such "double-counting" was impermissible under the Eighth and Fourteenth Amendments. Trial counsel should have been aware of this and should have made the proper motion pursuant to Collins. Had he done so, there is no reason to believe that the trial court would have denied the motion. The result would have been that the respondent would have received a sentence of life without parole because no other aggravating circumstances were found justifying the imposition of the death sentence.

Petitioner's argument that the subsequent change in the law, (see Perry v. Lockhart, 871 F.2d 1384 (8th Cir.), cert. denied, 493 U.S. 959 (1989), citing Lowenfield v. Phelps, 484 U.S. 231 (1988)), distinguishes this case to the point that certiorari should be granted ignores Strickland's admonition regarding the distorting effects of hindsight. The status of the law at the time of respondent's trial was clear. As the Eighth Circuit Court of Appeals noted, the respondent "was sentenced while Collins was good law, and was entitled to its benefits at the time of his sentencing." Fretwell v. Lockhart, 946 F.2d 571, 578 (8th Cir. 1991).

The Eighth Circuit also noted that, "[T]he district court found that the performance of Fretwell's trial counsel was

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deficient because he was ignorant of Collins. Lockhart does not challenge this finding, nor do we." Id. at 574. Therefore, the only claim which the petitioner can make is that no prejudice resulted due to the deficiency, and his argument rests on the unlikely proposition that had the motion been timely made, the trial court would have denied it. In other words, that pecuniary gain as an aggravating circumstance would have been submitted to the jury despite the clear rule of Collins.

In support of his position, petitioner suggests that the trial court would have denied the Collins' motion in deference to Jurek v. Texas, 428 U.S. 262 (1976). This is a far reaching assumption in light of the fact that Jurek analyzed Texas' capital murder statute, whereas Collins focused directly on the Arkansas statute. Jurek does state that the "narrowing function" required of capital punishment statutes by the Eighth Amendment may be performed in either of two ways -- through legislative definition of the crime or by consideration of aggravating circumstances at the sentencing phase of a capital trial. Not until the Eighth Circuit's opinion in Perry v. Lockhart, 871 F.2d 1384, cert. denied, 110 S. Ct. 378 (1989), however, was the Jurek rule applied to the Arkansas statute. The law in the Eighth Circuit at time of respondent's trial was the rule of Collins, and there is no reason to assume that the trial court would have ignored it in favor of a strained application of the Jurek rule.

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Petitioner's argument does nothing more than suggest an alternative analysis which could possibly have been used by the trial court to avoid the rule of Collins. This does not in any way suggest what the trial court most probably would have done, and under the present facts, an assessment of probability is the only way to satisfy the "prejudice" requirement of Strickland's two-prong test. To demonstrate that the respondent suffered no prejudice, the petitioner must prove that the trial court probably would have denied a Collins motion. No amount of speculation or rhetoric regarding what the court might have done can prove this point. Furthermore, it is obvious that without the benefit of the later decisions of Lowenfield and Perry, the court would have looked to Collins for guidance. Given that probability, the prejudice to Fretwell is obvious and of such gravity that the outcome of his trial would have been different but for it. Absent his counsel's omission, the court would not have permitted the jury to consider pecuniary gain as an aggravating circumstance, and he would not have been sentenced to death.

Finally, Respondent would point out that the only remedy which will remove the taint of prejudice in this case is to unconditionally reduce his sentence to life without parole. That is what he would have gotten but for his counsel's ineffective assistance. To permit the State of Arkansas to retry the sentencing phase of Fretwell's trial, as petitioner suggests, would perpetuate the prejudice he suffered at his original trial. There

is no reason to believe that the jury's findings on the sentencing issue would be different than they were in 1985. The only difference is that their findings would now be legal because the law has changed. Pecuniary gain could be, and undoubtedly would be, used as an aggravating circumstance, and the outcome would be the same. The respondent would receive a death sentence. Such a proceeding and result would mask the fundamental unfairness which occurred in respondent's trial. As stated by the Eighth Circuit, ". . . fundamental unfairness exists when a prisoner receives a death sentence rather than life imprisonment solely because of his attorney's error." Fretwell v. Lockhart, at 577. This is what happened to Fretwell, and the only appropriate remedy is to leave undisturbed the Eighth Circuit's ruling.

CONCLUSION

For the reasons stated hereinabove, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BOBBY RAY FRETWELL, RESPONDENT

By: 

RICHARD R. MEDLOCK
COUNSEL FOR RESPONDENT
1810 UNION NATIONAL PLAZA
124 WEST CAPITAL AVENUE
LITTLE ROCK, AR 72201
(501) 370-5024